

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1010-CR

Cir. Ct. No. 2009CF227

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GINO X. MONTOYA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Gino Montoya appeals a judgment of conviction. The issues relate to a search of Montoya's residence. We affirm.

¶2 Montoya pled no contest to various controlled substance offenses. Before doing so, he filed a suppression motion. The circuit court denied the motion after holding an evidentiary hearing. This appeal follows under WIS. STAT. § 971.31(10) (2011-12).¹

¶3 Montoya's first argument is that the search warrant affidavit lacked sufficient facts to show probable cause for a search of his residence. He relies mainly on this passage from *State v. Ward*, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517: "In finding that the affidavit supplied sufficient facts from which to draw an inference of probable cause to search, *we are not suggesting that when there is sufficient evidence to identify an individual as a drug dealer, as all the parties conclude there was, that there is sufficient evidence to search the suspect's home.*" *Id.*, ¶36 (emphasis added).

¶4 Montoya frames his argument in a needlessly complicated way. As written, it appears to follow this path: The circuit court erred in holding that the affidavit showed probable cause because *Ward* requires a nexus between the alleged drug dealing and the dealer's residence, and here the court relied on only the affidavit's clause about the officer's training and experience to establish that nexus, but training and experience by itself should not be sufficient to infer that nexus.

¶5 That framing is needlessly complicated because it ultimately does not matter on appeal what the circuit court said in deciding the suppression motion. Our review of probable cause from the face of a warrant affidavit is de

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

novο. See *State v. Sloan*, 2007 WI App 146, ¶7, 303 Wis. 2d 438, 736 N.W.2d 189. Accordingly, Montoya’s argument can be simplified to: *Ward* requires a nexus between the alleged drug dealing and the dealer’s residence, and here the only information in the search warrant affidavit that might show such a nexus is the provision about the officer’s training and experience, which should not be sufficient by itself.

¶6 We conclude that the affidavit was sufficient. Immediately after the above *Ward* quotation that Montoya relies on, the court further stated: “In this case, the affidavit identifies one address in Beloit [connected to Ward] and two individuals [including Ward] who both deal drugs in volume. Accordingly, we find sufficient facts in the affidavit to connect illegal drugs to the Ward residence and therefore find a basis for finding probable cause to issue a search warrant.” *Ward*, 231 Wis. 2d 723, ¶36. Earlier, the court had concluded that it was reasonable to infer that Ward dealt in “high volume.” *Id.*, ¶30.

¶7 The State argues that the affidavit here was sufficient to show that Montoya was a high volume dealer. We agree. The affidavit included the statement of a person, who we will call R., who told police that Montoya “can get it all”; that R. had personally purchased cocaine from Montoya once; that “a lot of people had Gino Montoya’s phone number and that Gino Montoya would show up at after bar parties with cocaine and heroin for sale.”

¶8 The affidavit also contained a statement by an unidentified citizen informant who said that another person, C., was “moving heroin for a larger supplier by the name of Gino Montoya” who the informant stated “goes to Chicago every week or every other week and then returns and sells heroin.”

¶9 Based on this material, it was reasonable for the issuing magistrate to infer that Montoya was a high volume dealer and, thus, the affidavit was sufficient to show probable cause for a search of Montoya's residence. Accordingly, we can stop our analysis of the affidavit here, and we need not address the role that the "training and experience" clause might play.

¶10 Montoya's second group of arguments is based on an evidentiary hearing that was held in response to his claim that the search warrant affidavit contained deliberately false statements in violation of *Franks v. Delaware*, 438 U.S. 154 (1978), and *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

¶11 Montoya argues that the affidavit's version of R.'s statement was deliberately misleading because it stated that R.'s purchase of cocaine occurred at a specific residence, and the affidavit later stated that Montoya lives at that address. But in fact, Montoya argues, police knew when preparing the affidavit that, at the time of R.'s purchase, the residence was occupied by a friend of R.'s, not by Montoya. Therefore, Montoya argues, the affidavit falsely left the impression that Montoya was selling out of his *own* residence, when in fact the sale had occurred at someone else's residence, which Montoya moved into only after the sale.

¶12 This argument fails for two reasons. First, as we described above, the affidavit shows probable cause to search Montoya's residence even if the affidavit did not support an inference that Montoya had ever sold from his own residence. Second, a careful reading of the affidavit itself would lead the reader to recognize that Montoya was probably not a resident of the address at the time of the sale. The affidavit includes a statement by the owner of that residence stating that Montoya became a tenant at a time after the sale to R. Therefore, to the extent

a reader might be led by the affidavit to believe that Montoya lived at the address at the time of that sale, that belief would be contrary to the most reasonable reading of the affidavit.

¶13 Montoya's final argument concerns a statement the affidavit attributes to V., who was reported to have said that he bought drugs from Montoya and that Montoya lived at the above-discussed residence. Montoya argues that V.'s statements were coached, coerced, and otherwise improper, and that V. also stated he did not buy drugs at Montoya's residence, which was not included in the affidavit. This argument fails because V.'s statements are unnecessary to support the inference that Montoya was a high volume dealer. Even if we were to agree that V.'s statements should be discarded from consideration, the affidavit would still show probable cause for the search based on the statements of R. and the unnamed citizen informant.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

